

E-FILED 1/23/09

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

STEVE J. WOLF,

NO. C 09-0173 RS

Plaintiff,

v.

**ORDER REASSIGNING CASE
AND RECOMMENDING THAT
APPLICATION TO PROCEED *IN
FORMA PAUPERIS* BE DENIED
AND CASE BE DISMISSED**

FEDERAL GOVERNMENT OF THE UNITED
STATES OF AMERICA

Defendant.

A. Motion to Proceed *In Forma Pauperis*

Plaintiff Steve Wolf filed a complaint as well as an application to proceed *in forma pauperis*. Pursuant to 28 U.S.C. § 1915(a)(1), the court may authorize the commencement of an action "without prepayment of fees" by a person who submits an affidavit of poverty, indicating that the affiant is "unable to pay such fees." Upon approval of the application, the court allows the action to proceed without payment of a filing fee, and service of process is made by "officers of the court" at public expense. 28 U.S.C. § 1915(c)-(d).

Wolf states that he is employed by the federal government in "space" and has not been paid for nine years. He receives \$11.60 monthly in Social Security benefits and \$7.51 monthly in pension payments for a total monthly income of \$19.11. Wolf lists three dependents (his wife and two children) who receive \$623.20 per month from him. He lists no debts and his only claimed monthly expense is rent of \$11.60. Plaintiff later claims that he does *not* pay rent, utilities, or a mortgage.

1 He asserts that he has no monthly expenses for food or clothing. Finally, Wolf lists a bank account
2 with a present balance of \$50. Thus, Wolf's monthly income of \$19.11 exceeds his claimed
3 expenses by more than \$600. Wolf, however, discloses no credit card debts or any other accruing
4 liabilities that would explain the apparent discrepancy between his claimed lack of income and his
5 acknowledged expenses. Accordingly, even though his income is limited, Wolf's affidavit in support
6 of his application to proceed *in forma pauperis* is insufficient to support the conclusion that he is an
7 individual "unable to pay" the filing fee and the costs of service.

8 Under *Tripati v. Rison*, 847 F.2d 548, 549 (9th Cir. 1988), a magistrate judge "has no
9 authority to issue a dispositive order denying in forma pauperis status" absent the consent of the
10 parties under 28 U.S.C. § 636(c). Furthermore, the consent of the named defendant may not be
11 solicited, because service of process will not be effectuated until *in forma pauperis* status is granted
12 or the filing fee is paid. Even were Wolf to consent to the jurisdiction of the undersigned Magistrate
13 Judge, the consent of the defendant is essential to the court's power to enter an order denying *in*
14 *forma pauperis* status. *Hajek v. Burlington N. R.R. Co.*, 186 F.3d 1105, 1107-08 (9th Cir. 1999)
15 (appellant who had expressly consented to jurisdiction of magistrate judge not estopped from
16 challenging jurisdiction based upon failure of appellee to consent).

17 Therefore, while it is the conclusion of the undersigned Magistrate Judge that Wolf fails to
18 demonstrate eligibility for *in forma pauperis* status, the order determining his application to proceed
19 *in forma pauperis* must be ruled upon by a District Judge. This case is reassigned to a District Judge
20 with the recommendation that Wolf's application to proceed *in forma pauperis* be denied.

21 B. The Complaint Appears to be Frivolous

22 In addition to permitting an action to proceed without the prepayment of a filing fee, 28
23 U.S.C. § 1915 also provides that the court shall dismiss a case if, at any time, the court determines
24 that such case is frivolous. See 28 U.S.C. § 1915(e)(2)(B)(i). Here, Wolf's complaint consists of
25 one sentence that states: "Iv'e been building a company for nine years[.] I work 18 to 20 hours
26 everyday, I can not find my assets." The one page complaint further includes a color photo of a
27 comet. While Wolf may feel that the federal government has not paid him any wages for his work in
28 "space," he fails to set forth any claim upon which the court could award relief. For these reasons, it

1 appears that Wolf's case is frivolous and may, therefore, be dismissed. Accordingly, this case is
2 reassigned to a District Judge with the recommendation that Wolf's action be dismissed.

3 IT IS SO ORDERED.

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5 Dated: January 23, 2009


6 RICHARD SEEBORG
United States Magistrate Judge

United States District Court
For the Northern District of California

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